Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Special Access Rates for Price Cap Local Exchange Carriers	))))	WC Docket No.05-25 RM-10593

RESPONSE OF CALTEL TO PUBLIC NOTICE

The California Association of Competitive Telecommunications Companies[1] ("CALTEL") respectfully submits the following response to Public Notice DA-11-1576, released September 19, 2011, requesting data to assist the Commission in analyzing issues raised in the *Special Access Order and NPRM*.[2]

I. Introduction and Summary

Over the last several years, many CALTEL member companies have provided the Commission with data about the special access services that they purchase and sell in response to earlier requests for the voluntary submission of such data. These companies also have filed numerous comments and *ex parte* notices,[3] are actively participating in

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[1] CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. CALTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, broadband, and video services. The majority of CALTEL members are small businesses that help to fuel the California economy through technological innovation, new services, affordable prices and customer choice. *See* www.caltel.org for a list of CALTEL member companies.

[2] *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access Order and NPRM").*

[3] *See, e.g.* Data Submission of Level 3 Communications, dated February 14, 2011, Data Submission of U.S. TelePacific d/b/a TelePacific Communications, dated January 27, 2011, Data Submission of XO Communications LLC, dated January 27, 2011, Data Submission of MegaPath Inc. and Covad Communications, dated February 17, 2011, Data Submission of New Edge Networks (now part of

this proceeding and may very well submit responses of their own to the *Public Notice*. This is, however, the first time that the association is submitting comments.

CALTEL's direct interest in this proceeding has been prompted by its recent analysis of special access/wireless backhaul issues in the California Public Utilities Commission's (CPUC's) investigation into the proposed acquisition of T-Mobile USA by AT&T.[4] CALTEL's review of data produced by AT&T and T-Mobile in that investigation shows that:

(1) AT&T is leveraging its control over special access in California to gain control over the market for emerging alternatives, such as Ethernet services, where California might otherwise enjoy a competitive market; and

(2) AT&T violated federal regulations by failing to make certain special access pricing flexibility terms it offered T-Mobile available to other carriers.

Thus the results of this analysis are directly relevant to the Commission's goal of examining "the current state of competition for special access services" in order to "determine whether the Commission's pricing flexibility rules are working as intended."[5]

Unfortunately, as CALTEL describes below, the Commission will be unable to gather similar data or confirm CALTEL's conclusions via the voluntary data submissions outlined in the Public Notice. This response is therefore focused on Public Notice Section E, Question 1 – the Commission's invitation to provide information about "the

EarthLink Business Solutions), dated January 27, 2011 and Data Submission of Cbeyond, dated February 1, 2011.

[4] California Public Utilities Commission (CPUC) Investigation 11-06-009 (Issued June 15, 2011), Order *Instituting Investigation on the Commission's Own Motion Into the Planned Purchase and Acquisition by AT&T Inc. of T-Mobile USA, Inc., and its Effect on California Ratepayers and the California Economy.*

[5] *Public Notice* at p. 1.

quality, utility, and clarity of this data request" and to describe "important issues not covered in this or previous data requests in this proceeding."[6]

II. AT&T Leveraged its Control Over Special Access to Gain Control Over Unregulated Markets

The data CALTEL reviewed in the CPUC proceeding demonstrates how AT&T leveraged its control over special access throughout the state of California to gain control of the markets for emerging alternatives for wireless backhaul, beginning with the lucrative markets where competition might otherwise emerge. As CALTEL described in its comments in the CPUC's investigation, and in declarations by its economic expert, Joseph Gillan, and Executive Director Sarah DeYoung,[7] AT&T leveraged the ubiquitous geographic coverage of the network it built when it had a guaranteed rate of return to capture the lion's share of T-Mobile's DS-1 traffic via demand lockup agreements, then modified those agreements in private side-agreements to ensure that T-Mobile would purchase all (or nearly all) of its largely unregulated Ethernet-based backhaul from AT&T within AT&T's California footprint.[8]

The effectiveness of that strategy was confirmed by the market share AT&T controls of T-Mobile's Ethernet business in some of California's most lucrative markets (e.g. the Bay Area, San Diego and San Francisco). As CALTEL explained to the CPUC, if there is to be competition for Ethernet wireless backhaul, it will necessarily emerge in

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[6] *Public Notice* at p. 20 (Section E, Question 1).

[7] *See generally* CPUC Investigation 11-06-009, *Additional Comments of the California Association of Competitive Telecommunications Companies Regarding Backhaul and Merger Conditions*, *Declaration of Joseph Gillan*, *Declaration of Sarah DeYoung,* August 22, 2011 (Public Versions).

[8] CALTEL's conclusions and analyses discussed in this response are part of the public record in Investigation 11-06-009. Nearly all of the specific data analyzed by CALTEL, however, was marked "CONFIDENTIAL" or, more often, "HIGHLY CONFIDENTIAL" by either AT&T or T-Mobile (or both). CALTEL therefore cannot disclose that data here.

the first instance in areas where economic demand can fuel the investment in supply. AT&T appears to be have forestalled such competition by relying on its broad geographic footprint to get T-Mobile to first enter into DS-1 agreements full of early termination and volume commitment penalties, and then agreeing to waive such penalties if T-Mobile purchases Ethernet circuits from AT&T in high-revenue MSAs.

III. AT&T Violated Federal Regulations Regarding Pricing Flexibility Contract Tariffs

Equally (if not more) problematic is that AT&T violated federal regulations by failing to file required special access pricing flexibility contract tariffs with this Commission.

As the Commission is aware, 47 C.F.R. §§ 69.727 and 61.55 combine to require AT&T to file contract-based tariffs for special access services in pricing flexibility MSAs. CALTEL's analysis of the backhaul agreement between AT&T and T-Mobile, which addressed both Ethernet and DS-1 pricing and purchases, demonstrated that AT&T did not file or make available to similarly situated customers special access pricing flexibility contract tariffs associated with execution of and updates to that agreement.[9]

In a public filing at the CPUC, AT&T admitted that it did not file the agreements to which CALTEL refers, but argues that it was not required to do so.[10] AT&T's

[9] *See* CPUC Investigation 11-06-009, *Reply Comments of the California Association of Competitive Telecommunications Companies*, *Declaration of Sarah DeYoung,* August 29, 2011 (Public Versions).

[10] Letter dated November 15, 2011 from J. David Tate to Commissioner Catherine J.K. Sandoval, CPUC Investigation 11-06-009.

argument can only be refuted by disclosure of the documents that AT&T marked HIGHLY CONFIDENTIAL, thereby precluding public evaluation of its claims.

Moreover, CALTEL's review of AT&T's federal tariff for California suggests that its violation of 47 C.F.R. §§ 69.727 and 61.55 may not be limited to the two special access agreements with T-Mobile. In his comments at a CPUC workshop, a witness testifying on behalf of AT&T stated that "the other driver for prices going down is (to) just take a look at the number of price LEC contract tariffs we filed or the number of state agreements that we have filed that will offer pricing concessions to customers."[11]

CALTEL did just that for California. It turns out that AT&T filed only four contract tariffs for California and Nevada, only one of which was for wireless backhaul, in the two-year period between August 2009 and August 1, 2011.[12] It is hard to imagine that this level of contracting would create much downward pricing pressure in any market, particularly one dominated by one supplier. This leads one to wonder whether "the number of price LEC contract tariffs we filed" referred to by AT&T's may, in fact, have never been filed. This data also belies AT&T's claim that it "has entered into a number of pricing flexibility contracts for backhaul with wireless customers,"[13] unless, as discussed above, AT&T is not complying with its obligations to notice and file these agreements.

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[11] *Transcript of the CPUC Public Workshop for Friday, July 8, 2011 in San Francisco, California* at p. 89, http://www.cpuc.ca.gov/NR/rdonlyres/617C0FD7-C7B8-40E3-9F17-C28FE591B908/0/PUBLIChearing070811.pdf.

[12] *See* CPUC Investigation 11-06-009, *Reply Comments of the California Association of Competitive Telecommunications Companies* at p. 10, August 29, 2011 (Public Version).

[13] CPUC Investigation 11-06-009, *(Second) Declaration of Parley Casto,* August 22, 2011, ¶14.

IV. The Commission Will Not Be Able to Analyze the Impact of These Types of Agreements on Special Access and Related Markets Without Requiring Price Cap LECs to Produce Them

It would not have been possible for CALTEL to analyze or draw conclusions about AT&T's control of the special access market in California, and AT&T's ability to leverage that control into the related market for Ethernet backhaul, if the CPUC had not first required AT&T and T-Mobile to produce copies of the tariff *and* off-tariff agreements between them. Based on that experience, CALTEL suggests that the Commission will need to issue mandatory data requests to price cap LECs similar to those propounded by the CPUC in order to get a complete and accurate picture of the special access market in this docket.

A. Price Cap LECs Have Already Refused to Voluntarily Produce Copies of These Agreements

As the Commission recently noted in its opposition to a Petition for Writ of Mandamus in this proceeding, CALTEL member Level 3 Communications has urged the Commission to require production of exactly the type of agreements that the public record reflects were made available subject to a protective order in the CPUC's investigation:

> Even one of the parties that advocates special access reform has acknowledged that the FCC will need to obtain and analyze more data before it can determine the appropriate course of action in this proceeding. In March 2011, Level 3 Communications told the Commission that "the competitive significance" of special access contract tariffs "is not ascertainable without further data." Letter from Erin Boone, Level 3, to Marlene H. Dortch, FC, WC Docket 05-25, March 7, 2011, at 2 (Attachment C). And in June 2011, representatives of Level 3 discussed with FCC staff "the types of pricing data concerning tariffed and non-tariffed special access purchases by Level 3 that might be available and useful to enable the

> Commission to more fully evaluate competition relating to such purchases." Letter from Erin Boone, Level 3, to Marlene H. Dortch, FCC, WC Docket No. 05-25, June 23, 2011 , at 1 (Attachment D).[14]

Not surprisingly, AT&T and Verizon have vehemently opposed making copies of these agreements available. For example, as Level 3 points out in its March 7, 2011 letter,[15] Verizon argued that such data is "competitively sensitive" and "highly confidential."[16] However, as Level 3 correctly observes, this is "precisely what makes them so crucial to the Commission's competitive analysis."[17]

Verizon also apparently argued that these types of contracts are irrelevant to this proceeding because they deal with unregulated or deregulated services that are "not subject to price caps or the associated pricing flexibility regime, and thus are not even part of this inquiry."[18] Level 3 again correctly pointed out that "such contracts often contain provisions that provide purchasers with discounts on DS1 and DS3 special access circuits and thus are properly part of this proceeding."[19]

This was certainly the case for the specific contracts between AT&T and T-Mobile that CALTEL analyzed in California. But, more generally, CALTEL also described to the CPUC what many other parties in this proceeding have repeatedly argued:

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[14] *Opposition of Federal Communications Commission to Petition for Writ of Mandamus,* United States Court of Appeals for the District of Columbia Circuit, No. 11-1262, at p. 21.

[15] *Id., Attachment C* (Level 3 Letter).

[16] *Letter from Donna Epps, Verizon to Marlene H. Dortch, FCC, Data Requested in Special Access NPRM,* WC Docket No. 05-25, dated February 28, 2011 (Verizon Letter).

[17] Level 3 Letter at p. 2.

[18] Verizon Letter at p. 2.

[19] Level 3 Letter at p. 2.

> AT&T weaves an intricately tangled web in designing its demand lock-up contracts with large purchasers of special access circuits. These contracts vary with the needs of the customer, but generally employ some common mechanisms. In general, they commit customers to purchase significant quantities of services (and usually tie purchases of regulated services to purchases of unregulated or deregulated services), with a variety of onerous penalties for demand shortfalls, in order to obtain discounted rates and/or avoid disconnection or "grooming" penalties.[20]

CALTEL's review of AT&T's pricing flexibility contract tariffs for California identified some common of these contracting mechanisms:

> • Customer purchases of less costly AT&T substitute services are limited or disallowed (e.g. a CLEC purchaser may only be allowed to purchase a certain percentage of circuits as UNEs before incurring significant penalties);
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> • Customer purchases of contract special access services are tied to discounts or other advantageous terms and conditions for purchases of unregulated or deregulated services;
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> • Customers can only avoid costly "early termination charges" of contract special access services if circuits are converted to unregulated AT&T services (e.g. conversion of TDM-based special access services to AT&T Ethernet services);
>
> • Minimum Annual Revenue Commitments (known as the "MARC") are calculated to tie customer purchases of its traditional special access circuits to purchases of AT&T unregulated or deregulated products;
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> • Additional constraints are placed on customer's ability to "groom" or otherwise rearrange services based on changes in underlying customer demand (e.g. disconnect or change the number of circuits terminating at a specific end user customer location or cell site);
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> • Discounts are limited to, or additional discounts are offered for, "winback" circuits (i.e. the customer is required to provide documentation that the circuit has been converted from an alternative carrier);

[20] *See* CPUC Investigation 11-06-009, *Opening Comments of the California Association of Competitive Telecommunications Companies* on the Order Instituting Investigation into AT&T/T-Mobile Merger at pp. 8-9, July 6, 2011 (Public Version).

• An additional default penalty (i.e. in addition to the MARC and other demand commitments) can be assessed for failure to purchase a specified number of services (usually designated as a demand "floor") by a given date;

• Significant termination penalties are assessed if the customer falls behind and AT&T terminates the contract for a material breach.[21]

CALTEL also discovered that, just as importantly, the relevant terms and conditions of these demand lock-up contracts are not captured in a single document. Thus a comprehensive understanding of the contract can only be obtained by reviewing the master agreement containing the tariff contracts, a number of seemingly unrelated public tariffs, and other supplemental "terms and conditions" documents. CALTEL believes that for most contracts, these piece-parts include, but are not limited to, the following:

- Non-tariffed commercial agreements (e.g. for AT&T, the customer's Broadband Service Agreement);
- Pricing Flexibility Contract Offers for DS1 and DS3 services purchased in Metropolitan Statistical Areas (MSAs) where Phase II pricing flexibility has been granted;
- Other types of term-and-volume discount plans (e.g. Term Payment Plans, or TPPs, or Managed Value Plans, or MVPs);
- Prices, terms and conditions for any DS1 and DS3 circuits not covered by the Pricing Flexibility Contract Offer (i.e. for commingled circuits in pricing flexibility MSAs or special access circuits in "price cap" MSAs);
- Any applicable "Guidebooks" or similar documents that contain standard descriptions, pricing, and other terms and conditions for unregulated or deregulated services (and which will apply in case customers default on any material terms of the commercial agreement);
- "Acceptable Use Policies," or similar document that limits how purchased services may be used;
- Any other Supplemental Terms and Conditions that may apply (e.g. in the absence of applicable Guidebooks, etc.)

[21] *Id.*at pp. 9-10.

It is critical for the Commission to require price cap LECs to produce these relevant "piece parts" in order for it to complete any meaningful analysis of the state of competition, and the effectiveness of existing regulations, in national special access markets.

B. Customers of Price Cap LECs Cannot Voluntarily Produce Copies of These Agreements

In rebuttal to CALTEL's analysis of the AT&T/T-Mobile contracts, and their effect on the wireless backhaul market in California, AT&T's backhaul witness suggested that unhappy special access customers are "sophisticated entities" that have access to the Commission's "fast-track" complaint process, and that the fact that there are no publicly filed complaints means that customers are satisfied with the services and discounts being provided.[22]

[22] *See* CPUC Investigation 11-06-009, *Reply Comments of New Cingular Wireless PCS, LLC (U-3060-C), Its Affiliated Entities, and T-Mobile West Corp. d/b/a T-Mobile (U-3056-C),* Supplemental Reply Declaration of Parley Casto at p. 4, fn 1, August 29, 2011 (Public Version). ["I am aware of comments that the standard rates in AT&T's contracts and tariffs for legacy DS1services are too high, and that wireless carriers therefore must choose the discounts to receive reasonable prices. This assertion is likewise unsubstantiated and is inconsistent with the facts. The FCC has not found AT&T's backhaul rates in California to be unreasonable. In fact, if wireless carriers thought AT&T's standard prices for legacy DS1 backhaul services were unreasonable, they could bring complaints at the FCC and ask the FCC to set a reasonable rate. ***The fact that no one has done so (id.) indicates that AT&T's standard rates are reasonable."*** Emphasis added].

It bears noting that the authority cited by Mr. Casto in his discussion of this point, *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 909-11 (D.C. Cir 2009), a decision in which the court upheld the FCC's elimination of dominant carrier pricing regulation for AT&T special access lines, suggests that it might have reached a different conclusion "had the FCC lifted all common-carrier regulation on the ILECs' special access lines, thereby potentially allowing ILECs to leverage their control over special access lines into undue control of the broadband business services market (and to presumably squeeze out competitive broadband business service providers)." *Ad HocTelecomm.,* 572 F.3d at 908. In other words, the D.C. Circuit Court of Appeals recognized the significant import on markets of the kind of conduct that AT&T has engaged in with T-Mobile, as explained by CALTEL in its comments before the CPUC.

CALTEL expects that AT&T and other price cap LECs may raise the same objection here, and similarly ask the Commission to conclude that if no special access customers have voluntarily produced copies of alleged anti-competitive tarriff and off-tariff agreements, there must not be any in existence. Both of these claims would be incorrect and disingenuous.

1. The Absence of FCC Complaints is not Proof that Special Access Agreements are not Anti-Competitive

First, AT&T's argument that the wireless backhaul market must be OK because there are no pending fast track complaints against AT&T about those services is misleading. As the Commission is aware, T-Mobile itself (among others) was a very vocal advocate of reform in this proceeding, both on its own behalf and as a member of the "No ChokePoints" coalition, up until the announcement of its proposed acquisition by AT&T.[23] Thus T-Mobile (and other large special access customers) were addressing their concerns in this proceeding, seeking structural reform instead of the expensive, one-off remedies under the Commission's fast-track complaint system.

2. Special Access Customers' Failure to Voluntarily Produce Copies of Inter-related Tariff and Off-Tariff Agreements is not Proof that They Do Not Exist or Are Not Anti-Competitive

The production of the tariff and off-tariff agreements between AT&T and T-Mobile in the CPUC's investigation is what directly led to evidence that AT&T leveraged its control over the special access backhaul market in order to gain control of the less regulated Ethernet backhaul market in California. Production of these agreements also

[23] *See, e.g., Reply Comments of the NoChokePoints Coalition, Special Access Rates for Price Cap Local Exchange Carriers et al, WC Docket 05-25,* dated February 24, 2010.

led to CALTEL's discovery that AT&T had violated federal special access pricing flexibility rules.

But T-Mobile's failure to voluntarily produce these agreements in this proceeding does not invalidate these conclusions. T-Mobile, like all other large purchasers of special access services that enter into similar agreements, was bound by the terms of its master agreement with AT&T to keep ***the entire agreement confidential***.

Even if this was not the case, when individual customers—large purchasers of special access—are negotiating these contracts, they are not primarily motivated to make purchasing decisions that increase the overall competitiveness in the market, or restrain the market power of a large price cap LEC. Their goal is to negotiate the best agreement they can for their company within the parameters of the current rules and regulations. Many no doubt believe that they have gained a competitive advantage over other large special access customers, usually because the large price cap LEC has told them that this is the case.

For these reasons, the Commission's current request for voluntary competition data will not result in production of these agreements, and it is critical for the Commission to require price cap LECs to produce them.

CONCLUSION

For the reasons described above, CALTEL urges the Commission to supplement its request for voluntary submissions of competition data by issuing a mandatory data request to price cap LECs that requires them to produce copies of any tariff and off-tariff contracts that act together to provide discounts on legacy special access circuits. CALTEL's analysis of a set of agreements between AT&T and T-Mobile in a recent

CPUC investigation demonstrates that, as CALTEL member Level 3 Communications has advocated in this proceeding, the Commission cannot possibly ascertain the current state of competition in the special access market, or the need to modify or enforce existing regulations, without the ability to review and analyze this critical data.

Respectfully submitted,

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